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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-662

THE TIMES-PICAYUNE PUBLISHING CORPORATION,

Petitioner,

versus

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE
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THE TIMES-PICAYUNE PUBLISHING CORPORATION,

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

The Times-Picayune Publishing Corporation (hereinafter referred to as the Company), the Petitioner herein, through undersigned counsel, petitions this Court for a Writ of Certiorari to review the decision in this case rendered on September 9, 1974 by the United States Court of Appeals for the Fifth Circuit. That decision reversed the decision of the United States District Court for the Eastern District of Louisiana which had dismissed the complaint filed against the Company by the Equal Employment Opportunity Commission (hereinafter re-

ferred to as the EEOC) pursuant to its authority under Title VII of the Civil Rights Act of 1964[1] (hereinafter referred to as Title VII or the Act).

I. OPINIONS BELOW

The opinion of the Court of Appeals below is reported at 500 F.2d 392, 8 FEP Cases 697 (5th Cir. 1974) and is reproduced as Appendix A at App. p. 1a-2a.[2] The decision of the District Court is reported at 7 FEP Cases 880 (E.D. La. 1973) and is reproduced as Appendix C at App. p. 4a-13a.

II. JURISDICTION

The decision of the Court of Appeals was rendered on September 9, 1974. The Company's petition for rehearing was denied on October 7, 1974. Thereafter, on October 31, 1974 the Court of Appeals granted the Company's motion to stay issuance of the mandate until November 30, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

III. QUESTION PRESENTED

In a Title VII suit brought by the EEOC, how must the EEOC plead that it has investigated the charge upon which suit is based?

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1 42 U.S.C. §2000e *et seq.* (1970), *as amended*, 1972.

2 References to the Appendix are indicated as App. p. ___a.

IV. STATUTORY PROVISIONS

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, provides in pertinent part:

> Section 706 (a) . . . .
>
> (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, *and shall make an investigation thereof.* . . . If the Commission determines *after such investigation* that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. . . . If the Commission determines *after such investigation* that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. . . .
>
> . . . . .

> (f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . .
>
> . . . . .
>
> (3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. . . .

Title VII of the Civil Rights Act of 1964, Section 706 (b), (f), 42 U.S.C. Section 2000e-5(b), (f) (1970).

V. STATEMENT OF THE CASE

This action was brought by the EEOC against the Company alleging past and continuing violations of Title VII. In its original complaint, the EEOC alleged generally that "[a]ll conditions precedent to the institution of this lawsuit have been fulfilled." Thereafter, the EEOC filed an amended complaint deleting this general allegation and alleging instead that a charge had been timely filed and the EEOC had been unable to secure an acceptable conciliation agreement. The amended complaint contains no allegation that the EEOC investigated the charge.

The Company then filed a motion to dismiss the complaint because of the failure of the EEOC to allege investigation of the charge pursuant to Section 706(b) of the Act. It was the Company's position that the amended complaint did not properly invoke the jurisdiction of the Court as required by Rule 8(a)(1),[3] and, therefore, the Court lacked jurisdiction over the subject matter and was required to dismiss the complaint pursuant to Rule 12(b)(1).[4]

On October 10, 1973, the District Court dismissed the complaint with leave to amend.[5] The EEOC declined to amend its complaint, and the District Court entered a final order dismissing the complaint on October 30, 1973.

In dismissing the complaint, the District Court held that investigation pursuant to Section 706(b) of the Act was a prerequisite to the court's exercise of jurisdiction which the EEOC had failed to properly allege under Rule 8(a)(1). The EEOC appealed the dismissal to the United States Court of Appeals for the Fifth Circuit.

The Court of Appeals reversed the decision of the District Court and remanded the case with directions to allow the EEOC to file an amended complaint alleging generally that all conditions precedent to suit had been fulfilled. Although not specifically so ruling, the Court of Appeals decision implicitly held that investigation of the charge was not jurisdictional and subject to the pleading require-

3 Fed. R. Civ. P. 8(a)(1).

4 Fed. R. Civ. P. 12(b)(1).

5 The Court also granted Wendell Payne, the sole charging party in this suit, ninety days to file his own suit. No such suit was filed.

ment of Rule 8(a)(1), but rather was a condition precedent that could be pleaded generally pursuant to Rule 9(c). The Court of Appeals also held that it need not consider whether the EEOC's first amended complaint (which did not allege generally that all conditions precedent had been fulfilled) was sufficient since, the Court of Appeals stated, it had been filed in an effort to meet the District Court's erroneous view of the law.

On September 19, 1974 the Company filed a petition for rehearing alleging that the Court of Appeals had (1) erred in its conclusion that investigation could be pleaded generally, (2) erred in stating that the EEOC had filed its amended complaint in response to a suggestion by the District Court, and (3) failed to consider the District Court's judgment as a summary judgment ruling. The petition for rehearing was denied on October 7, 1974. On October 31, 1974, pursuant to the Company's motion, the Court of Appeals stayed issuance of its mandate until November 30, 1974.

VI. ARGUMENT

In 1972 the Act was amended to grant the EEOC power to file suit under Title VII. Under that amendment the EEOC can now file suit if it has investigated the charge, found reasonable cause to believe the Act has been violated, and failed to achieve an acceptable conciliation agreement. Section 706(b), (f)(1). This case concerns the pleading of the investigation requirement.

That issue has been highly controverted. Several courts have held that investigation (or the similar requirements of section 706(b)) is a condition precedent that need be

pleaded only generally by the EEOC pursuant to Rule 9(c). *See, e.g., EEOC v. Wah Chang Albany Corp.*, 499 F.2d 187 (9th Cir. 1974); *EEOC v. Westvaco Corp.*, 7 FEP Cases 579 (D. Md. 1974); *EEOC v. Laclede Gas Company*, 6 FEP Cases 1282 (E.D. Mo. 1973). Many other decisions have found that investigation is a jurisdictional prerequisite to suit by the EEOC that must be pleaded specifically pursuant to Rule 8(a)(1). *See, e.g., EEOC v. Western Electric Co.*, 364 F. Supp. 188, 6 FEP Cases 709 (D. Md. 1973); *EEOC v. Griffin Wheel Co.*, 360 F. Supp. 424, 6 FEP Cases 297 (N.D. Ala. 1973); *EEOC v. Container Corporation*, 352 F. Supp. 262, 5 FEP Cases 108 (M.D. Fla. 1972).

While this issue is a pleading question, it is more than a technicality since investigation, if jurisdictional, goes to the very power of the district court to hear the complaint. Further, suits by the EEOC involve important public policy considerations and are increasing in number. The proper pleading of these suits is of national concern and should receive an early determination by this Court.

Furthermore, the resolution of this important issue extends beyond pleading requirements to encompass the proper role of the EEOC vis-a-vis the court in Title VII suits. By downplaying the importance of investigation in the statutory scheme devised by Congress, the EEOC is attempting to shift to the crowded dockets of the federal district courts the enormous task of conducting full scale investigations of the charges involved in these suits.[6] The

6 Plaintiff's First Interrogatories contained 62 separate questions and the First Request for Production of Documents contained 33 separate requests. The information sought covers a thirteen-year period. Had the EEOC properly performed its statutory duty to investigate the charge, it would not have to seek this information through federal court discovery.

EEOC is deemphasizing its own investigation of the charge in favor of the use of subpoenas and pre-trial discovery in federal court. Such a procedure is contrary to the intent of Congress to limit the burden on the federal courts by requiring the EEOC to conduct the investigation and conciliation process.[7] It was to insure that such thorough, meaningful investigation and conciliation efforts occurred that the Congress made these matters jurisdictional prerequisites to the EEOC's exercise of its enforcement power.

Investigation Is A Jurisdictional Prerequisite That Must Be Pleaded Specifically Pursuant To Rule 8(a)(1)

The Company agrees that the exclusion of evidence and the dismissal of lawsuits on "technicalities" generally tends to avoid rather than serve the interest of justice. However, the federal courts have consistently held that a proper allegation of jurisdiction is not a "technicality", and jurisdiction must appear from the face of the complaint. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936); *Bowman v. White*, 388 F.2d 756 (4th Cir.), *cert. denied*, 393 U.S. 891 (1968). Furthermore, procedural safeguards deliberately placed in the Act by Congress requiring the EEOC to first thoroughly perform its investigation and conciliation efforts before subjecting the employer to a serious and costly suit can hardly be considered "technicalities."

---

7 *Cf. Miller v. International Paper Co.*, 408 F.2d 283 (5th Cir. 1969) (emphasis added):

> Additionally, such a provision [requiring the EEOC to perform its duty to investigate and seek voluntary compliance before exercising its enforcement powers] would be demanded by the important policy *implicit* in H.R. 405 of delimiting the burden of the federal courts in employment discrimination cases.

The obvious intent of Congress, as reflected by the procedural steps of Section 706(b) and 706(f)(1), was not only that an investigation be made — so that the already overburdened federal courts would not be used for an investigation which the EEOC itself should make — but also that the investigation be current or at least reasonably recent; otherwise the federal courts would be flooded with injunction suits of a most serious nature in which the facts were outdated and the issues moot. Meaningful conciliation is unlikely when based on a stale investigation.

Since the inception of the Act, Congress has emphasized voluntary compliance as the preferred method of enforcement of Title VII. The original Act denied enforcement power to the EEOC. In the 1972 amendments Congress granted the EEOC power to bring suit in federal court, but only after the filing of a charge, notice to the employer, investigation, a reasonable cause determination, and, finally, the failure to achieve voluntary compliance.[8] The Company submits that these procedural steps are jurisdictional prerequisites to the power of the EEOC to bring suit in federal court.

The legislative history of both the original Act and the 1972 amendments illustrates that Congress intended the EEOC concentrate on voluntary compliance rather than litigation. Various versions of the original Act would have provided, in addition to private enforcement, two other types of enforcement. One bill provided for adjudication by the EEOC itself, like the National Labor Relations Board, with hearing and cease and desist

8 *See* U.S.C. § 2000e-5 (1970), *as amended*, 1972.

power. H.R. 405, 88th Cong., 1st Sess. (1963). The report of the House Education and Labor Committee emphasized, however, that EEOC enforcement was desirable only as a last resort.

> It is the intent of the Committee that maximum efforts be concentrated on informal and voluntary methods of eliminating unlawful employment practices before commencing formal procedures. . . . [F]ormal proceedings leading toward an order of the Commission should be pursued only when informal methods fail or appear futile.

H.R. Rep. No. 570, 88th Cong., 1st Sess. (1963).

Another early bill provided that the EEOC could bring a civil action in a federal court if it had not eliminated the unfair employment practice by less stringent means. H.R. 7152, 88th Cong., 1st Sess. (1964). This bill, reported by the House Judiciary Committee, was also explained as requiring conciliation prior to the institution of civil action.

> The procedures are carefully spelled out . . . . Those procedures are designed to give due protection to everyone. They command that there first be voluntary procedures.

110 Cong. Rec. 1638 (Feb. 8, 1964). (Remarks of Rep. Lindsey).

Actually, the bill as first reported did not "command" but rather allowed the EEOC to bring civil action after

conciliation or "in advance thereof if circumstances warrant." H.R. 7152, 88th Cong., 1st Sess. (1964). However, Representative Celler of New York offered an amendment deleting the "in advance thereof" clause in order to "make it clear that an attempt would have to be made to conciliate . . . before an action could be brought in district court." 110 Cong. Rec. 2566 (Feb. 8, 1964). (Remarks of Rep. Celler). The deletion was made, but the compromise bill which eventually emerged denied the EEOC the power to bring suit, and the significance of the decision, for a time, was rendered moot.

In 1972, the proposed amendment to the Act resurrected the question of enforcement power for the EEOC.[9] Once again, early versions focused on granting the EEOC the power to issue cease and desist orders. It is significant that one proposed bill, H.R. 1746, 92nd Cong., 2nd Sess. (1972), called for such action "after it [the EEOC] has exhausted the procedures for achieving voluntary compliance." Eventually, after more compromise, the amendment as passed permitted suits by the Commission "if . . . unable to secure from the Respondent a conciliation agreement acceptable to the Commission." *Joint Explanatory Statement of Managers at the Conference on H.R. 1746 to Further Promote Equal Employment Opportunities for American Workers, House Conference Report No. 899,* to accompany H.R. 1746, 92nd Cong., 2nd Sess. (1972). The language of the amendment as well as its legislative history clearly indicate that Congress intended the EEOC to follow the procedures outlined for voluntary compliance before initiating civil action. The amendment is patterned after previous bills in which

9 Pub.L.No. 92-261, 86 Stat. 103 (1972).

Congress clearly indicated litigation was to follow, not precede, less formal efforts.

One of the earliest cases to consider the issue is *EEOC v. Container Corporation*, 352 F. Supp. 262 (M.D. Fla. 1972), in which Judge Tjoflat ruled:

> The Court views each of the deliberate steps in this statutory scheme — charge, notice, investigation, reasonable cause, conciliation — as intended by Congress to be a condition precedent to the next succeeding step and ultimately legal action. Certainly, the EEOC does not contend that it could skip one or more of these steps at will. The language of the Act is mandatory as to each step and the Commission must complete each step before moving to the next.

Id. at 265. The Court held that each of these steps must be specifically, rather than generally, pleaded. In *EEOC v. Griffin Wheel Co., supra*, the court ruled:

> The motion is primarily aimed at the allegation in the complaint that "all conditions precedent to the institution of this lawsuit have been fulfilled," which is the only allegation in the complaint which in any way could be construed to be an allegation that the Commission has been unable to secure a conciliation agreement acceptable to the Commission.
>
> Plaintiff Equal Employment Opportunity Commission oppose the motion on the ground that Rule 9(c) of the Federal Rules of Civil Procedure

> requires only that conditions precedent be pleaded as a conclusion. The Court is of the opinion that Rule 9(c) applies to the performance or occurrence of conditions precedent to liability but does not apply to matters which affect the Court's jurisdiction which are governed by Rule 8(a). . . .

360 F. Supp. at 425-26, 6 FEP Cases at 297.

Although the particular jurisdictional prerequisite in issue in *Griffin Wheel* was conciliation, the case cited with approval *Container Corporation* which listed investigation as another prerequisite. *Id.* In *Western Electric Co., (Md)., supra,* the court, while holding that all the procedural steps were jurisdictional and must be pleaded, stated:

> [I]t is the Court's opinion that the statutory scheme set forth is jurisdictional in nature and requires the Commission to allege satisfaction of each condition precedent.
>
> While this statutory language appears broad, this Court believes that Rule 9(c) applies to the performance or occurrence of conditions precedent to liability. It does not apply to matters which affect the Court's jurisdiction. That issue is governed by Rule 8(a).

6 FEP Cases at 710-711 (citations omitted).

Support is lent to this view by the Supreme Court decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792

(1973). In that case the Supreme Court held that the timely filing of a charge with the EEOC and the timely filing of suit following receipt of the right to sue notice were the only jurisdictional prerequisites to suit by a private claimant. The Supreme Court clearly labeled these requirements jurisdictional to the right to file suit; not merely conditions precedent to the right to recover. Since investigation, a reasonable cause determination, and conciliation *are* required where suit is filed by the EEOC rather than an individual,[10] the rationale of *McDonnell Douglas Corp. v. Green* suggests these steps also are jurisdictional.

Under *McDonnell Douglas Corp. v. Green, supra,* it is clear that the requirements in section 706 (f)(1) for an EEOC suit (*i.e.,* the lapse of 30 days and the failure to achieve conciliation) are jurisdictional. There is no valid reason to distinguish the procedural steps of Section 706(b) from section 706(f)(1) merely because they are in separate subsections of Section 706 of the Act. As discussed previously, under one version of the original bill the EEOC would have been empowered to bring suit after following the procedural steps outlined in Section 706. When the enforcement power was removed, the procedural steps remained in the Act as subsection (b). Under the 1972 amendments, subsection (f)(1) was added, granting the EEOC enforcement power. Given the continued interest of Congress in voluntary settlements, there is no reason to believe Congress intended that subsection (b) now be ignored in suits by the EEOC.

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10 Even those cases allowing investigation and the other steps to be pleaded generally pursuant to Rule 9(c) agree that they are mandatory prerequisites to suit by the EEOC. *E.g., EEOC v. Wah Chang Albany Corp., supra; EEOC v. Bartenders International Union,* 6 FEP Cases 208 (C.D. Calif. 1973); *EEOC v. Pick-Memphis Corp.,* 5 FEP Cases 1310 (W.D. Tenn. 1973).

To the contrary, it is clear that the Act provides for several steps in an orderly, chronological pattern prior to the last resort, court action. It refers, in order, to a charge, notice, investigation, finding of reasonable cause, conciliation, and, only then, litigation. From the placement of each procedural step in the Act, it is apparent that each step is a prerequisite to the next. Obviously there can be no notice of charge without the actual filing of the charge. It is equally clear that there can be no conciliation without an investigation. What unfair employment practice could the Commission conciliate without first making an investigation to determine its existence? Each step is essential; each is a prerequisite to court action.

The failure to allege that all prerequisites to suit have been fulfilled is the failure to properly invoke the court's jurisdiction under the Act. Since jurisdiction of a federal district court is not presumed, *Miller v. Brown Shipbuilding Company*, 165 F.2d 956 (5th Cir. 1948), the court lacks jurisdiction over the subject matter and must dismiss the complaint pursuant to a Rule 12(b)(1) motion. *Haley v. Childers*, 314 F.2d 610 (8th Cir. 1963); *Nishiyama v. North American Rockwell Corp.*, 49 F.R.D. 288 (C.D. Cal. 1970).

The Company submits that the courts allowing the procedural steps of the Act to be pleaded generally under Rule 9(c) have failed to properly distinguish between a suit brought by a private individual and a suit brought by the EEOC.[11] Reliance on prior case law holding com-

11 In *EEOC v. McLean Trucking Co.*, 5 FEP Cases 608 (W.D. Tenn. 1972), the court gave as reason for its holding:

> [E]fforts for compliance by way of reconciliation [sic] have not heretofore been absolute requirements under the law before an action may be brought for relief on the basis here asserted.

plaints would not be dismissed because of EEOC failure to comply with statutory procedures[12] is misplaced since these cases held that individual complainants should not be prejudiced by the shortcomings of the EEOC. In *Quarles v. Philip Morris*, 271 F. Supp. 842 (E.D. Va. 1967), the court stated:

> The plaintiff is not responsible for the acts or omissions of the Commission. He, and the members of his class, should not be denied judicial relief because of circumstances over which they have no control.

Id. at 846. See also *Mondy v. Crown Zellerbach Corp.*, 271 F. Supp. 258, 263 (E.D. La. 1967), *rev'd on other grounds*, 398 F.2d 496 (5th Cir. 1968). There is an obvious difference between refusing to allow EEOC omissions to bar *individual* suits and requiring the EEOC to live up to its congressionally-mandated duty to investigate and conciliate before it files its *own* suit.

In a Fourth Circuit case discussing Representative Celler's amendment clarifying conciliation as a prerequisite to court action, the court stated that the amendment would have been of controlling importance had the EEOC been empowered to bring suit. Noting, however, that the burden of enforcement had shifted from the Commission to the person aggrieved, the court stated, "We

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Dent v. St. Louis-San Francisco Ry., 406 F.2d 399 (5th Cir. 1969); *Johnson v. Seaboard Airline RR*, 405 F.2d 645 (4th Cir. 1968); *Pena v. Hunt Tool Co.*, 296 F. Supp. 1003 (S.D. Tex. 1968).

5 FEP Cases at 609. Of course, all cases cited by the court involved complaints failed by individual plaintiffs.

12 See the cases cited by *McLean*, *supra*, n. 11.

think the shift in emphasis deprived the amendment of much of the weight which we would otherwise award it." *Johnson v. Seaboard Air Line Railroad Company*, 405 F.2d 645, 650 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969). The court reasoned that an individual's only remedy would be lost if the voluntary procedure had to be strictly observed, and repeated that it would be different if the EEOC could bring suit.

> The shift in the Congress from a rationale of national official enforcement to a policy of private individual vindication is, we think, of controlling importance. While the emphasis of the bill was on protection of the public interest, a greater emphasis on voluntary compliance was reasonable. But with the present emphasis on private vindication of individual rights, fairness to an aggrieved individual demands that timeliness assume a greater importance and excessive delays cannot be justified.

Id. at 652-53 (footnotes omitted).

The Fifth Circuit expressed a similar view in an earlier case. In discussing an EEOC with enforcement power, the Court made reference to Representative Celler's amendment.

> Obviously, under that scheme it would be expectable to find a provision requiring the EEOC to perform its duty to seek voluntary compliance before exercising its enforcement powers. Such a provision would be a necessary precaution to insure that the EEOC did not shirk its responsibility.

Miller v. International Paper Company, supra, n. 7 at 289.

Now the sole enforcement remedy is not left in the hands of private individuals; the Commission itself can institute a civil action. No individual will lose his right to bring suit if the EEOC is required to fulfill its statutory obligations before bringing an action. Indeed, the reasoning of the courts which vindicated the enforcement rights of private litigants revealed that should the EEOC have enforcement power, it would be an abuse of that power to use it without having attempted to secure voluntary compliance.

The "conditions precedent" referred to by Rule 9(c) apply to the performance or occurrence of requirements necessary for the plaintiff to recover on his claim. *EEOC v. Griffin Wheel, supra.* But the procedural steps of Section 706 are not concerned with whether the EEOC can obtain relief. Rather, these procedural steps must be followed before the EEOC is even authorized to bring suit.[13] These procedures control whether the EEOC can get in the courthouse, not whether it is entitled to relief. Thus the procedures are jurisdictional and are governed by Rule 8(a)(1).

> It is significant that pre-amendment courts generally held that before an action was properly instituted under Title VII, an aggrieved person had to file a charge with the EEOC within ninety days of the alleged violation. Suit had to be in the United States District Court within thirty days of receiving notice of the Commission's failure to

13 See the discussion of legislative history *supra* at p. 9-12.

> achieve voluntary conciliation. "These requirements are *jurisdictional* and must be *specifically alleged.*" *Logan v. General Fireproofing Co.*, 309 F.Supp. 1096 (W.D. N.C. 1969 (emphasis added). While the courts were in disagreement as to what additional steps of the Act were jurisdictional vis-a-vis private suit, *recognition that the statutory scheme involved jurisdiction is sufficient to refute the Commission's contention that only matters of relief are before this Court.*

EEOC v. Western Electric, (Md.) supra, at 711 (emphasis added). *See EEOC v. Container Corp., supra.* Therefore, the Company submits that the better-reasoned cases hold that the procedural steps of the Act are, in a suit by the EEOC, jurisdictional and governed by Rule 8(a)(1).

Analysis discloses that the EEOC is attempting to maintain its suit on a "technicality" while completely ignoring the intent of Congress. As discussed above, Congress went to great lengths to establish a system in which litigation would be the last resort. An integral part of that system is a thorough investigation followed by conciliation efforts if the Commission finds "reasonable cause" to believe that there was a violation of the Act. In its suit, filed in May, 1973, the EEOC alleges numerous *continuing* violations by the Company. Yet it introduced an affidavit reflecting that the very limited investigation which it did conduct relative to the Company *took place five years prior to the filing of its suit.*[14]

14 While acknowledging that an EEOC investigator came to the plant in 1968 on some kind of investigation, the Company never conceded that an appropriate investigation had taken place. In the first

It is this reliance upon a stale and incomplete investigation to support a complaint alleging continuing violations that is the "technicality" upon which the EEOC is basing its suit. It is most unlikely that Congress intended the EEOC to proceed to litigation upon such an investigation. Not only does such a procedure thwart congressional intent, but if permitted it would allow the EEOC to use the already overburdened federal judicial system as a vehicle for conducting its investigation. It is clear from the discovery pleadings[15] that the EEOC is attempting to have the federal courts perform its investigation. In no other way could it hope to establish the alleged continuing violations. The EEOC should not be allowed to use the federal courts to conduct its investigation and conciliation.

The District Court's action dismissing the complaint did not dispose of the matter since the dismissal was subject to the right of the EEOC to file an amended complaint correcting the deficiency. However, the Company submits that this procedure is not a mere formality since the EEOC will have another opportunity to discover appropriate facts, thereby enabling it to make a proper determination whether any further conciliation or litigation is required.[16] A current investigation rather than one

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place the record in no way shows that a realistic investigation of this charge ever took place, and, secondly, whatever investigation did take place occurred five years before the EEOC's alleged effort to conciliate the violations it found.

15 See n. 6 *supra*.

16 Although not at issue in this appeal, it should be noted that the EEOC has failed to comply with its own regulation requiring notice to the employer that it has one "last chance" to reach a conciliation agreement. 29 C.F.R. § 1601.23; *see EEOC v. Firestone Tire and Rubber Co.*, 6 FEP Cases 996 (D.C. Md. 1973). This failure to comply with its regulations emphasizes the superficial nature of the EEOC's approach to this suit and its obvious reliance on a fishing expedition conducted through federal court discovery rather than the prescribed agency processes.

five years old would certainly be fairer to all parties and would allow a more informed decision by the EEOC. This approach would be legally correct, would potentially dispose of the entire case, and would in no way be prejudicial to the EEOC. It would be a dismissal with a right to file a complaint directed at any issues that might remain after investigation and conciliation. Litigation may never be necessary at all.

The Complaint Pleads Investigation Neither Specifically Nor Generally

Although the EEOC's original complaint alleged generally that all conditions precedent had been fulfilled, it filed an amended complaint that alleged investigation neither specifically nor generally. The Court of Appeals states that the amended complaint of the EEOC "was filed in an effort to meet the district court's erroneous view of the law."[17] However, this factual conclusion is not supported by the record.

The EEOC filed its original complaint on May 15, 1973. On July 2, 1973, the EEOC filed an amended complaint, deleting the general allegation that all conditions precedent had been fulfilled and alleging instead that more than thirty days had elapsed between the filing of the charge and the institution of the suit and that the EEOC had been unable to secure an acceptable conciliation agreement. Nowhere did the EEOC allege investigation.

No action, other than the routine granting of exten-

17 500 F.2d at 393.

sions of time in which to plead, was taken by the District Court between the time of the EEOC's original and amended complaints. The Company's motion to dismiss was not filed until July 16. A hearing on the merits of the Company's motion to dismiss was not held until August 8, 1973, more than one month following the amendment by the EEOC of its complaint. Thus, from these facts, the EEOC's amendment of its original complaint could *not* have been in any way dependent upon the District Court's view of the law since the District Court expressed no opinion and took no action until *after* the EEOC decided to amend its complaint.

Further, the EEOC amended its complaint to allege conciliation only; it did not allege investigation. Yet, from its opinion it is clear that the District Court considered an allegation of investigation just as mandatory as an allegation of conciliation. See App. p. 9a. If the EEOC's amendment of its complaint had been prompted by the District Court's view of the law, then the amendment would have included an allegation of investigation as well as an allegation of conciliation. But since the EEOC amended to allege conciliation only, the only reasonable explanation is that the amendment was made as a policy decision by the EEOC and not in response to any view of the law suggested by the District Court.

The EEOC amended its original complaint for its own reasons. Thereafter, it refused to amend its complaint within the thirty days allowed by the District Court. The complaint on which the EEOC deliberately chose to rest its case does not allege investigation either specifically or generally, nor does it allege that all conditions precedent to suit have been fulfilled. The amended complaint does

not comply with *EEOC v. Standard Forge & Axle Company*, 496 F.2d 1392 (5th Cir. 1974). Therefore, the order of the District Court dismissing the complaint should be affirmed.

The Complaint Fails to State a Claim Upon Which Relief Can Be Granted

Regardless of the correct manner of pleading, it is clear that the EEOC cannot prevail on the merits of a Title VII suit without proving that it has both investigated and conciliated the charge giving rise to the suit.[18] Since both investigation and conciliation are mandatory prerequisites to recovery by the EEOC, they are essential elements of its claim that must be alleged in the complaint. Failure to include these essential facts in the complaint is the failure to state a claim upon which relief can be granted. *EEOC v. Westvaco Corp.*, 7 FEP Cases 579 (D. Md. 1974). It would be futile, and a burden on the District Court, to allow the EEOC to go forward without essential facts which it could neither plead nor prove.

The Court of Appeals Erred in Failing to Consider the Dismissal By the District Court as a Summary Judgment Ruling

The Court of Appeals failed to consider the District Court's decision as a ruling on a motion for summary judgment as an alternative to a ruling on the motion to dismiss. While the Company's motion was not specifically designated as a motion for summary judgment, nor was it specifically discussed in the District Court's deci-

18 See n. 10, *supra*.

sion as a motion for summary judgment, the record shows that undisputed facts were considered by the District Court in reaching its decision. The District Court's label on its disposition of an action is not binding on the Court of Appeals. *Smith v. Local No. 25, Sheet Metal Workers International Association*, 500 F.2d 741 (5th Cir. 1974). If the facts show that the District Court's ruling was in the nature of summary judgment, then the Court of Appeals should have considered it as such whether or not it was designated as such by the District Court. *Id.*

The record shows that the EEOC submitted an affidavit to the District Court in connection with the Court's ruling on the Company's motion to dismiss, and this affidavit was considered by the District Court. Further, the District Court's ruling went into the facts of the inadequate and stale investigation conducted by the EEOC. Whether there was compliance with the statutory requirement of investigation was argued by both parties and decided by the District Court. Based on these facts, under Rule 12(b),[19] the Company's motion to dismiss was automatically converted to a motion for summary judgment, and the Court of Appeals should have considered it as such. *Smith v. Local No. 25, Sheet Metal Workers International Association, supra.*

The Company does not contend that the record in the District Court raised the issue of the adequacy of the investigation made by the EEOC; rather, the District Court considered the timeliness of the investigation in connection with the suit filed years later alleging *continuing* violations. The District Court found that the original in-

19 Fed.R.Civ.P. 12(b).

vestigation had "moss on it" and did not satisfy the "investigation" requirement of Section 706(b) for a suit now.[20]

The District Court's dismissal of the complaint should be affirmed since a five-year-old investigation of a single individual charge is not sufficient compliance with Section 706(b) to support a suit by the EEOC alleging numerous continuing violations of Title VII.

VII. CONCLUSION

For the above reasons, this petition should be granted, the decision of the Court of Appeals should be reversed, and the judgment of the District Court dismissing the complaint should be affirmed.

s/ Samuel Lang

SAMUEL LANG
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A Professional Corporation
615 Howard Avenue
Post Office Box 60118
New Orleans, Louisiana 70160

COUNSEL FOR PETITIONER

20 The District Court's findings show that about five years elapsed between the EEOC's investigation and the filing of its suit.

CERTIFICATE

I hereby certify that I have this 26th day of November, 1974, mailed three copies of the above and foregoing Petition for Writ of Certiorari, by United States mail, postage prepaid, to: Margaret C. Poles, Equal Employment Opportunity Commission, Office of the General Counsel, 1206 New Hampshire Avenue, N.W., Washington, D.C. 70506.

/s/ Samuel Lang

SAMUEL LANG

APPENDIX A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,
versus

The TIMES-PICAYUNE PUBLISHING CORPORATION,
Defendant-Appellee.

No. 73-3995.

United States Court of Appeals,
Fifth Circuit.

Sept. 9, 1974.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before MOORE*, AINSWORTH and RONEY, Circuit Judges.

PER CURIAM:

Although we have been asked to render considerable advice as to what the EEOC must have done before it can prevail in this lawsuit, we regard this as a pleading case only, controlled by this Court's recent decision in EEOC v. Standard Forge & Axle Co., 496 F.2d 1392 (5th Cir. 1974).

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* Hon. Leonard P. Moore, Senior Circuit Judge of the Second Circuit, sitting by designation.

By following *Standard Forge,* we think the original complaint filed in this case by the EEOC, generally alleging that "all conditions precedent to the institution of the lawsuit have been fulfilled," was sufficient to withstand a motion to dismiss for lack of jurisdiction of the subject matter under Federal Rule of Civil Procedure 12(b)(1), and sufficiently complied with Rules 8(a)(1) and 9(c).

We need not concern ourselves whether the more limited allegations in the second complaint omit some condition precedent that may ultimately control the outcome of the case, inasmuch as this amended complaint was filed in an effort to meet the District Court's erroneous view of the law.

We therefore vacate the orders and judgment of the District Court granting defendant's motions to dismiss pursuant to Rule 12(b)(1), with directions to permit plaintiff to file a complaint alleging generally that all conditions precedent have been performed or have occurred, so that the litigation may proceed from that point, in accordance with our decision in *Standard Forge.*

The appellee shall bear the cost of this appeal.

Vacated and remanded with directions.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-3995

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

versus

THE TIMES-PICAYUNE PUBLISHING CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(October 7, 1974)

Before MOORE, AINSWORTH and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
MITCHELL, J.
OCTOBER 10, 1973

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

VERSUS

CIVIL ACTION
No. 73-1261
SECTION "F"

THE TIMES PICAYUNE PUBLISHING CORPORATION

Defendant's motion to dismiss plaintiff's complaint for lack of jurisdiction came on for hearing on a former date. The Court, after considering the record, the law, the argument of and briefs submitted by counsel, rules as follows:

The Equal Employment Opportunity Commission[1] filed suit against the Times-Picayune Publishing Corporation[2] alleging that the Times-Picayune has been and is now engaging in an unlawful pattern of discriminatory employment practices. The Times-Picayune filed a motion to dismiss on the ground that the Court lacked jurisdiction over the subject matter. This jurisdictional issue is the main bone of contention between the litigants.

1 Hereinafter referred to as "Commission".

2 Hereinafter referred to as "Times-Picayune".

Defendant alleges that the requirements embodied in 42 USC 2000e *et seq* presents a statutory scheme enacted by Congress and intended by it to be followed by the Commission before it may institute suit on its own behalf. Failure to follow the legislative scenario, as urged to us by defendant, results in a jurisdictional defect which subjects the Commission's suit to dismissal. The Commission, of course, denies in toto these allegations and implores us to hold the other way.

Authority need not be cited for the hornbook proposition that federal courts are courts of limited jurisdiction whose authority is limited to what Congress has granted them pursuant to a valid statute. The averment of jurisdiction by a litigant is a relatively simple procedure that requires only a short and plain statement of the grounds upon which the Court's jurisdiction depends.[3] Should the jurisdictional basis subsequently be scrutinized, then the burden of proving all jurisdictional facts rests upon plaintiff.[4]

There is no question but that we have jurisdiction over this subject matter and we so hold. There are at least three sources of its existence and possibly more.[5] The problem, however, lies in the elicitation of jurisdiction and not its creation.

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3 Rule 8 FRCP
"(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends,. . ."

4 *Birmingham Post Company v. Brown*, 217 F.2d 127 (CA5-1954).

5 28 USC 1343 (4); 28 USC 1345; 42 USC 2000e-5(f)(3).

By amendment on March 24, 1972, the Commission became vested with authority to institute legal proceedings on its own behalf whereas previously, lawsuits by individuals were the sole methods available for the elimination of unlawful employment practices. 42 USC 2000e-5(f) as amended, explicitly outlines the procedure to be followed before the Commission may institute a civil action:

> "1(f) (1) If within thirty days after a charge is filed with the Commission. . .The Commission has been unable to receive from the respondent (The Times-Picayune) a conciliation agreement acceptable to the Commission. . .the Commission may bring a civil action against any respondent not a government, governmental agency or political subdivision named in the charge."

To receive, or to attempt to receive, a conciliation agreement in accordance with the above quoted statute requires compliance with the statutory procedure set out in 42 USC 2000e-5(b) quoted here in pertinent part:

> "(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved. . .the Commission shall serve a notice of the charge (including the date, place, and circumstance of the alleged unlawful employment practice) on such employer. . .within ten days and shall make an investigation thereof. . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practices

> by informal methods of conference, conciliation, and persuasion."

To us, the statutory scheme is quite clear that prior to the institution of civil actions by the Commission, there must first be a charge, notice, investigation, determination of reasonable cause, and attempts at conciliation. These conditions precedent are obligatory and are not to be treated in a perfunctory manner.[6]

As the Court observed in the *Container Corporation* case at p. 265:

> "The Court views each one of the deliberate steps in this statutory scheme-charge, notice, investigation, reasonable cause, conciliation - as intended by Congress to be a condition precedent to the next succeeding step and ultimately legal action. Certainly, the EEOC does not contend that it could skip one or more of these steps at will. The language of the Act is mandatory as to each step and the Commission must complete each step before moving to the next."

Defendant has cited four unreported cases from the Northern District of Alabama,[7] that dismissed Commission suits on the basis of a jurisdictional defect when the

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6 *EEOC v. Container Corporation of America*, 352 FS 262 (MD Fla. - 1972).

7 *EEOC v. Guaranty Savings and Loan Association*, Docket No. 73-369-S; *EEOC v. Griffin Wheel Company et al*, Docket No. 73-429-S; *EEOC v. Birmingham Stove and Range Company*, Civil Action No. 73-201; *EEOC v. United States Pipe and Foundry Company, et al*, Docket No. 73-325.

Commission failed to specifically plead each element of the statutory scheme. It seems evident that in all those cases the necessary jurisdictional allegation made by the Commission consisted of the language "all conditions precedent to the institution of this law suit have been fulfilled" or language of similar import, which the Courts found to be inadequate. The Courts further found the allegations to be "jurisdictional in nature" and, as such, the simple statement that all the conditions precedent had been complied with was insufficient and subjected the Commission's suits to dismissal for failure to sufficiently allege jurisdiction pursuant to Rule (8)(a), FRCP.

Plaintiff here argues that the conditions precedent are not jurisdictional and their completion need only be avered generally pursuant to Rule 9(c), FRCP.[8]

Support for this proposition can be found in cases supplied the Court by the Commission.[9] Plaintiff's argument was best stated by the *Pick-Memphis* Court:

> "The basis for the second ground is that the plaintiff failed to allege, with specificity, performance of several of the various statutory requirements on which the right to relief is partly conditioned. Because of this failure, contends the

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8 Rule 9 FRCP, "(c) Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity."

9 *EEOC v. BARTENDERS International Union Local 41*, 6 EPD para 8702 (ND Calif. - 1973); *EEOC v. Pick-Memphis Corp.*, 5 EPD, para 8471 (WD Tenn. - 1973); *EEOC v. Missouri-Pacific Railway Co., et al.* No. C-73-127 (WD Tenn. - 1973).

> defendant, the Court is without jurisdiction to hear this case. However, these statutory requirements are not jurisdictional, and the failure of the complaint to allege, with specificity, performance of each statutory requirement does not deprive the Court of jurisdiction of this case."

Contrary to the above language, we are of the opinion that the statutory conditions precedent - charge, notice, investigation, reasonable cause, conciliation - are inextricably connected to our original grant of jurisdiction in these cases.[10] Each step must be pleaded, in a short and plain statement that convincingly establishes its actual or, in the case of conciliation, its attempted completion. This simple procedure meets both the requirements of Rule 8(a)(1) and Rule 9(c).

Plaintiff's original complaint contained the language that "all conditions precedent to the institution of this law suit have been fulfilled."

By amended complaint the following language was substituted for that phrase:

> "(5). More than thirty (30) days prior to the institution of this law suit, an aggrieved person filed a charge of discrimination with the EEOC alleging a violation by the Times-Picayune of rights under Title VII. Through informal methods of conference, conciliation and persuasion, the EEOC has been unable to receive a conciliation agreement acceptable to the EEOC."

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10 See fn. 5.

This language tracks substantially that of 42 USC 2000e-5(f), *supra*, which the Commission alleges is all that is required. While the amended language contains allegations of charge and attempts at conciliation the deletion of notice, investigation, and a determination of reasonable cause, we feel, results in a failure to properly aver this Court's jurisdiction.

Plaintiff alternatively argues that should its amended complaint be deemed insufficient for jurisdictional purposes then this Court should look to the affidavit of Mr. James A. Smith,[11] which states that a charge against the defendant was filed, notice was served on it, an investigation was conducted, a letter of determination was issued (the Court assumes this to be a determination of reasonable cause), and conciliation was attempted. What plaintiff seeks to accomplish through affidavit is what it failed to do in its pleadings i.e., sufficiently allege jurisdictional prerequisites. When a question of the district court's jurisdiction is raised, the court may, in its discretion, accept affidavits or inquire into the facts as they exist.[12]

On June 10, 1968, Mr. Wendall Payne, a Times-Picayune employee filed an individual charge with the Commission alleging discriminatory employment practices. Under the law at that time, an aggrieved party had ninety days after the alleged unlawful employment practice to file a charge with the Commission. Within thirty days after notification by the Commission of failure of

11 Deputy Director of the EEOC New Orleans office, whose affidavit is attached to plaintiff's opposition to defendant's motion to dismiss.

12 *Land v. Dollar*, 330 U.S. 731 (1947); *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178 (1936); See also, *Alker v. Insurance Co. of North America*, 279 FS 902 (ED La. - 1968).

conciliation attempts, the aggrieved party and not the Commission was permitted to file suit in Federal District Court. These two elements, i.e., charge and statutory notice from the Commission to the individual upon the failure of conciliation attempts, were very clearly the only jurisdictional requirements to be completed by an individual. Courts were reluctant to penalize an individual by dismissal of his suit on jurisdictional grounds when the Commission, over whom the individual had no control, failed to give notice of an individual's charges to an alleged discriminatory employer, failed to make an investigation, failed to make a determination of reasonable cause, or failed to attempt conciliation.[13] Consequently, these and other courts reasoned that the statutory prerequisites to be completed by the Commission prior to an individual's civil action were not jurisdictional in nature. The rationale, of course, was that dismissal of an individual's complaint on jurisdictional grounds because of inaction by the Commission was improper where the intent of the statute was clearly that allegations of unfair employment practices made by an individual were to be expeditiously investigated and, if warranted, eliminated. This rationale we think, is not totally applicable when the Commission, pursuant to its new authority, institutes suit in its own behalf.

We think that when the governmental body, vested by statutory authority to seek out and rectify unlawful discriminatory employment practices, seeks to do so through a civil action then, in that event, thoroughness and absolute compliance with pleading practices should be ex-

13 *Foye v. United A. G. Stoves Co-Op, Inc.*, 336 FS 82 (DC Neb. - 1972); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357 (CA7 - 1968); *Watson v. Limbach Co.*, 333 FS 754 (DC Ohio - 1971); *Dent v. St. Louis-San Francisco Railway Co.*, 406 F.2d 399 (CA5-1969).

hibited initially and not through an affidavit that seeks rectification nunc pro tunc. This is not to say that we will not consider the affidavit offered to us, for we will; but only in relation to the individual charge made by Mr. Payne almost five years ago.

On September 4, 1968, after Mr. Payne made his charge and, after notice was served, and an investigation conducted from June 10, 1968 till August 16, 1968, Mr. Payne's case file was forwarded to the EEOC Headquarters in Washington, D.C. for a decision. The file was not returned to New Orleans until April 2, 1970, almost two years later. On March 24, 1972, the Title VII amendment allowing the Commission to file suit was enacted. On April 12, 1973, a Notice of Failure of Conciliation was issued; almost five years after Mr. Payne's charge was filed and over a year and a half after his file was returned to New Orleans from Washington. It wasn't until this time, under either the old law or the new amendment, that Mr. Payne could have maintained an individual action had he so desired. We do not feel that this case has been handled in a prompt and resolute manner and for that reason we hold that for the purposes of Mr. Payne's individual charge, suit may be maintained by him in his own behalf. The Commission may not maintain an action on behalf of Mr. Payne. No provision is made in the amendment to 42 USC 2000e-5 for suits to be instituted "on behalf" of an aggrieved party by someone else. That statute provides either the Commission files suit in its own behalf after failing to enter into a conciliation agreement or it gives notice to the aggrieved individual that he has ninety days to file his own individual action after receiving such notice.[14] We feel the proper course of action

14 See also 42 LW 2175, *EEOC v. Cleveland Mills Co.*, 9/4/73.

is to dismiss plaintiff's complaint with leave to amend its complaint, as other courts have done,[15] within 30 days from the date of this order and, additionally, to allow Mr. Payne the right, should he desire to exercise it, to file suit on his own behalf based upon the statements in the Commission's affidavit.

We note that more than 90 days from the Notice of Failure of Conciliation has passed, so, for Mr. Payne's purpose, dismissal of plaintiff's suit will serve as notice to him that he has 90 days within which to file suit. This course of action would cause no great additional delay, especially in light of those which have already passed.

For the foregoing reasons, it is hereby ORDERED that defendant's motion to dismiss pursuant to Rule 12(b)(1) FRCP, is GRANTED with leave given to plaintiff to amend its complaint within 30 days from the date of this order.

IT IS FURTHER ORDERED that Wendall Payne be granted 90 days from entry of this judgment within which to institute a civil action pursuant to 42 USC 2000e-5(f)(1).

/s/ LANSING L. MITCHELL
UNITED STATES DISTRICT JUDGE

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15 See Fns. 6 & 7.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Civil Action No. 73-1261
SECTION "F"

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

versus

THE TIMES-PICAYUNE PUBLISHING CORPORATION,

Defendant.

FINAL ORDER AND JUDGMENT

THIS MATTER coming before the Court upon Plaintiff's Application for Immediate Entry of Final Order and Judgment in Accordance With the Court's Order of October 10, 1973 and the Court finding that plaintiff will not amend its complaint as allowed by the Court's Order of October 10, 1973,

IT IS ORDERED that Defendant's Motion to Dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure is granted for the reasons set forth in the Opinion of this Court filed October 10, 1973 in conjunction with the Court's Order of the same date.

/s/ LANSING L. MITCHELL
UNITED STATES DISTRICT JUDGE

New Orleans, La.
29 October, 1973.